PEMILIK DAN SESIAPA BERKENAAN DENGAN KAPAL ATAU VESEL "SITI AYU" DAN "MELATI JAYA"

v.

SARAWAK OIL PALM SDN BHD & ANOR

COURT OF APPEAL, PUTRAJAYA
MOHD GHAZALI YUSOFF JCA
HASHIM YUSOFF JCA
JAMES FOONG JCA
[CIVIL APPEAL NO: Q-02-793-02]
26 OCTOBER 2005

SHIPPING: *Action in rem - Admiralty jurisdiction - Counterclaim by defendants against plaintiffs' admiralty action in rem - Whether counterclaim fell within admiralty jurisdiction of court - Whether counterclaim could be heard by court with admiralty jurisdiction despite not falling under ambit of Admiralty Court - Supreme Court Act 1981 [UK], s. 20*

This was an appeal by the defendants against the decision of the High Court dismissing their counterclaim against the plaintiffs for the wrongful arrest and detention of the defendants' two tugboats. The plaintiffs had initially commenced an admiralty action *in rem* against the defendants for failing to furnish seaworthy tugboats for the purpose engaged, or alternatively, for failing to exercise reasonable skill and care in its undertaking. Based on this action, the plaintiffs arrested the two tugboats from the defendants' private wharf. Responding to this admiralty action, the defendants entered an unconditional appearance to challenge the plaintiffs' right of arrest of the two tugboats and also filed the aforementioned counterclaim. The learned High Court judge dismissed both the plaintiffs' claim and the defendants' counterclaim. The plaintiffs did not appeal but the defendants, being dissatisfied with the dismissal of their counterclaim, appealed. The main issue requiring determination was whether the learned judge was right in his finding that the defendants' counterclaim did not fall within s. 20 of the Supreme Court Act 1981 of England ('the Act') to allow a court with admiralty jurisdiction to hear the matter.

Held (allowing the defendants' appeal)
Per James Foong JCA delivering the judgment of the court:

[1] Principally, the cause of action in the defendants' counterclaim was for wrongful arrest and detention of the two tugboats. Then subsequently, by way of amendments, claims for damages in respect of the failure of the plaintiffs to comply with the order issued by the senior assistant registrar in respect of insurance and maintenance of the two tugboats, were added. However, none of these causes of action fell within any of the provisions set out in relevant sections of the Act or, for that matter, any other sections of the Act. These claims of the defendants were certainly outside the ambit of the admiralty jurisdiction of the court. In this respect, the learned judge was correct in his conclusion pertaining to the issue of admiralty jurisdiction *viz*. the defendants' counterclaim was not within the ambit of the Admiralty Court. Thus, the plaintiffs' claim was within the court's admiralty jurisdiction whilst the defendants' counterclaim fell under normal civil jurisdiction. However, although the two actions belonged to two different jurisdictions, the learned judge should have combined these two jurisdictions for the sake of convenience and disposed of the counterclaim as a non-admiralty proceeding in an action that originated from an admiralty proceeding (*The Cheapside* folld). Therefore, since the defendants' counterclaim involved the finding of liability and quantum, it would be appropriate for the court of first instance to decide on such matters. The appellate court should confine itself to hearing appeals from the court below rather than engaging itself on matters that the court of first instance was most suited to perform. (pp 136 A - D, 137 C & 138 D - F)

***[Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan defendan menentang keputusan Mahkamah Tinggi yang menolak tuntutan balas mereka terhadap plaintif bagi penangkapan salah dan tahanan kedua-dua kapal tunda defendan. Plaintif, sebelum ini, telah memulakan satu admiralti tindakan *in rem* terhadap defendan kerana gagal membekalkan kapal tunda yang layak layar bagi tujuan yang disangka, atau secara alternatif, kerana gagal menggunakan kemahiran dan ketelitian munasabah dalam tugas yang dijalankan. Berdasarkan tindakan ini, plaintif telah menangkap kedua-dua kapal tunda dari dermaga persendirian

defendan. Membalas tindakan admiralti tersebut, defendan telah memasukkan satu penghadiran tidak bersyarat untuk menentang hak plaintif untuk menahan dan juga memfail tuntutan balas yang disebut terdahulu. Hakim Mahkamah Tinggi yang arif telah menolak tuntutan plaintif dan tuntutan balas defendan. Plaintif tidak merayu tetapi defendan, tidak berpuas hati dengan penolakkan tuntutan balas mereka, telah merayu. Isu utama yang perlu diselesaikan ialah sama ada hakim yang arif adalah betul dalam penemuannya bahawa tuntutan balas defendan tidak jatuh dalam s. 20 Akta Mahkamah Agung 1981 di England ('Akta') bagi membenarkan sebuah mahkamah yang mempunyai bidang kuasa admiralti untuk mendengar perkara tersebut.

Diputuskan (membenarkan rayuan defendan)
Oleh James Foong JCA menyampaikan penghakiman mahkamah:

[1] Terutamanya, kausa tindakan di dalam tuntutan balas defendan ialah untuk tangkapan salah dan tahanan kedua-dua kapal tunda tersebut. Setelah itu, melalui pindaan, tuntutan untuk gantirugi disebabkan oleh kegagalan plaintif untuk mengikuti perintah yang disampaikan oleh Penolong Pendaftar Kanan mengenai insurans dan penyelenggaraan kedua-dua kapal tunda tersebut, telah ditambahkan. Walau bagaimanapun, tiada satu pun dari kausa tindakan tersebut jatuh dalam peruntukan di dalam seksyen relevan Akta atau seksyen lain Akta. Tuntutan defendan memang terletak di luar lingkungan bidang kuasa admiralti mahkamah. Dalam perkara ini, hakim yang arif memang betul dengan konklusinya berkaitan dengan isu bidang kuasa admiralti *viz*. tuntutan balas defendan tidak masuk lingkungan Mahkamah Admiralti. Oleh itu, tuntutan plaintif berada dalam bidang kuasa admiralti sementara tuntutan balas defendan termasuk dalam bidang kuasa sivil. Akan tetapi, walaupun kedua-dua tindakan tersebut termasuk dalam bidang kuasa berlainan, hakim yang arif sepatutnya menggabungkan kedua-dua bidang kuasa bagi tujuan kemudahan dan menyelesaikan tuntutan balas tersebut sebagai prosiding bukan admiralti dalam suatu tindakan yang bermula daripada prosiding admiralti (*The Cheapside* diikuti). Oleh itu, oleh kerana tuntutan balas defendan melibatkan penemuan terhadap liabiliti dan kuantum, ia adalah berpatutan bahawa mahkamah instans pertama menghakimi perkara tersebut. Mahkamah rayuan

A sepatutnya menghadkan diri kepada pendengaran rayuan dari mahkamah bawahan dan bukan melibatkan diri dalam perkara yang lebih sesuai diselesaikan oleh mahkamah instans pertama.*]*

Case(s) referred to:

B *Amon v. Bobbett [1889] 22 QBD 543* ***(refd)***
Shanghai Hall Ltd v. Town House Hotel Ltd [1967] 1 MLJ 223 ***(refd)***
The Cheapside [1904] P 339 ***(foll)***

Legislation referred to:

Courts of Judicature Act 1964, s. 24(b)
C Rules of the High Court 1980, O. 15 r. 2

Supreme Court Act 1981 [UK], ss. 20(1), (2), 21(1), 22

Other source(s) referred to:

Orders on High Court Pleading and Practice, 23rd edn, p 243

D *For the appellant - KY Lin (Jason Wong with him); M/s Kadir, Wong, Lin & Co*
For the respondent - Arun Krishnalingam (Mathew Kurien & Leonard Shim with him); M/s Reddi & Co

E *[Appeal from High Court, Miri; Admiralti In Rem No: MR 1-1991]*

Reported by Suresh Nathan

JUDGMENT

F **James Foong JCA:**

Background

The defendants are and were at all material times the owners and persons in control or possession of two tugboats: "Siti Ayu" and "Melati Jaya".
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On 28 November 1988 these two tugboats were engaged to tow a vessel known as "Tai Ho No. 1" out of Miri Port, through Miri Bar, in Sarawak. On board of Tai Ho No. 1 were 7565 bags of palm kernels (the cargo) belonging to the 1st plaintiff, as
H consignor, for delivery to the 2nd plaintiff, as consignee.

At about 2300 hours on 28 November 1988, tugboat Siti Ayu experienced ingress of seawater in her engine room where the glass panel was broken. This resulted in one of the tugboats to
I release the towrope fastened to Tai Ho No. 1 before the latter could clear the shallow channel of the route. Without assistance, Tai Ho No. 1 was slowly pushed by the waves to the bank of the river where she was grounded.

The owner of Tai Ho No 1 then engaged a salvage firm, Sealink Sdn Bhd, to carry out salvage operation on Tai Ho No. 1. In order to lighten the Tai Ho No. 1, for re-floating, a barge was brought alongside Tai Ho No. 1 to re-transfer the cargo on board. While this forced discharge operation was undertaken, on 8 December 1988, large swells were experienced resulting in 552 bags of the cargo being damaged by seawater sprayed onto it.

On 20 December 1989, the plaintiffs brought an admiralty action in the Miri High Court against the owner of Tai Ho No. 1 for damages amounting to RM157,647.30. This action is registered as MR4 of 1989.

In consequent to this action, Tai Ho No. 1 was arrested. It was only released upon the owner depositing a sum of RM200,000 with its solicitors who, undertook to pay the plaintiffs, if the plaintiffs succeed in their claim for RM157,647.30.

On 17 August 1991, the plaintiffs commenced another admiralty action in the Miri High Court over the same incident. This time, against the defendants for negligence in failing to furnish seaworthy tugboats for the purpose engaged, or alternatively for failing to exercise reasonable skill and care in its undertaking. And the amount claimed is also for RM157,647.30. This action is registered as MR1 of 1991.

Based on this action, the plaintiffs arrested Siti Ayu and Melati Jaya from the defendants' private wharf.

Responding to this admiralty action MR1 of 1991, the defendants on 14 August 1992, entered unconditional appearance to challenge the plaintiffs' right of arrest of these two tugboats. Besides, it also filed a counterclaim against the plaintiffs for the wrongful arrest and detention of these two tugboats, claiming damages for loss of use of these vessels and its upkeep (since the plaintiff has failed to tow them to a marine wharf as ordered by the senior assistant registrar of the Miri High Court during one of the many interlocutory applications taken out in this action).

The two admiralty actions (MR4 of 1989 and MR1 of 1991) were consolidated and heard before Justice Sulaiman Daud. The learned judge delivered two separate judgments. In both of these cases, he dismissed the plaintiffs' claim. His reasons, as disclosed in his judgment in MR1 of 1991, were: (a) for want of admiralty

jurisdiction and; (b) in the event that he (the learned judge) has erred on the question of jurisdiction, then the plaintiffs' claim is statute barred. Aside from this, he also dismissed the defendants' counterclaim (in action MR1 of 1991). The grounds advanced for this rejection are:

> The (defendants') counterclaim herein is embodied and form an integral part of the defence to an admiralty action in rem and is therefore in the nature of an admiralty action as well. As earlier stated the admiralty jurisdiction of this court is as is had by the High Court of Justice in England. Such jurisdiction is provided in section 20 of the 1981 Act. For this court to exercise its admiralty jurisdiction the matter to be heard and determined by the court must be one of the claim provided in the said section 20, including subsection (2) thereof. The court would be acting without jurisdiction if the claim is not within the ambit of the said section.
>
> Upon close scrutiny of the matters provided in the said section 20, including those under paragraphs (d) of the subsection (2) thereof which relate to "'claim for damages received by a ship", it is my finding that none of the cause or matter of the defendants' counterclaim against the plaintiffs herein fall within the ambit of the said section 20. I therefore hold that this court has no admiralty jurisdiction to hear and determine the defendants' counterclaim against the plaintiffs. Accordingly I also dismiss the defendants' counterclaim with costs.

The plaintiffs did not appeal against the decision handed down in both MR4 of 1989 and MR1 of 1991. However, the defendants, dissatisfied with the dismissal of its counterclaim, appealed. This is the appeal before us.

Consent Of The Parties

Before we commenced hearing the merits of this appeal, we were informed by Mr. Lin, counsel for the defendants, that since the plaintiffs, in their written submission, have agreed that the court of first instance which heard this case has jurisdiction and all that is required from this appellate court is a directive to revert this case back to the High Court at Miri to decide on the issues of liability and quantum of the defendants' counterclaim. Though Mr. Arun, counsel for the plaintiffs, confirmed what Mr. Lin said on the issue of jurisdiction, he, however, differs from the approach suggested by Mr. Lin in sending this counterclaim back to the court of first instance to decide. He stressed that since this court

(Court of Appeal) is possessed of power to decide on both liability and quantum of the defendants' counterclaim by relying on the notes of evidence recorded by the trial judge which is in the appeal records, this court can proceed to dispose off this case without the necessity of reverting this matter once again to the court below.

But before this court accepts the mutual agreement of the parties that the trial court has jurisdiction to entertain the defendants' counterclaim and decides on which of the two proposed approaches to adopt, we requested counsel from both sides to enlighten us on the ambit on their mutual agreement: that the court of first instance that heard this defendants' counterclaim has jurisdiction to do so. Does it mean that: (a) the said court of first instance has admiralty jurisdiction to hear the defendants' counterclaim or; (b) it has normal civil jurisdiction (as differs from that of admiralty jurisdiction) to hear the defendants' counterclaim? This clarification is necessary in view of the learned High Court Judge's grounds of decision where he found the defendants' counterclaim is in the nature of an admiralty action but not falling within s. 20 of the Supreme Court Act 1981 of England (1981 Act) to allow the court with admiralty jurisdiction to hear the matter.

Upon these questions posted, Mr. Lin first submitted that he considers the defendants' counterclaim falling within the jurisdiction of the admiralty jurisdiction since it is associated with the arrest of the two tugboats. But if this proposition is not acceptable to this appellate court, then he would respect the ruling of the trial judge that the defendants' counterclaim is not within the jurisdiction of the Admiralty Court but yet maintaining that the defendants could still pursue their counterclaim as a normal civil claim within an action that is originated by way of an admiralty action. After all, according to him, the Admiralty Court where this action commenced is a part of or a division of the High Court of Sabah & Sarawak at Miri, and it would be the same judge who would be hearing the plaintiffs' claim in an admiralty action and the defendants' counterclaim (which is not an admiralty action).

Mr. Arun, on the other hand, seemed to have no firm conviction over this proposition except to stress that this court should undertake the exercise in deciding on the defendants' counterclaim based on the appeal records before this court.

A **The Basic Law**

To appreciate Mr. Lin's initial stand on the questions posted by this court, it is necessary to examine whether the learned High Court Judge is right in his finding that the defendants' counterclaim does not fall within the jurisdiction of the Admiralty
B Court.

In admiralty action, a claim by the plaintiff or the defendant in his counterclaim can be either *in rem* or *in personam*. The governing provision for this is s. 21(1) of the 1981 Act. Though this is an
C English Act of Parliament, it is applicable to Malaysia by virtue of s. 24(b) of the Courts of Judicature Act 1964 which states:

> Without prejudice to the generality of section 23 the civil jurisdiction of the High Court shall include – the same jurisdiction and authority in relation to matters of admiralty as is had by the
D High Court of Justice in England under the United Kingdom Administration of Justice Act, 1981.

An action *in rem* is, as the name suggests, an action against a thing. Most common is the ship but at times against other
E property relevant to the dispute rather than against a person. In an admiralty proceeding *in rem*, the plaintiff commences his action by serving the process on the ship or other property and taking steps to have an officer of the court to arrest the ship or property and holds it in place. If the owner of the ship or property does
F nothing, the whole action may continue against the ship or property which may end up being appraised and sold by an order of the court to satisfy the victorious litigant.

An action *in personam* in an admiralty action is against a person, for example the ship owner. Though this procedure is simpler it is
G not as attractive. Although it might not be difficult to find the defendant within the jurisdiction of the court and serve on him the relevant papers it is quite another thing to obtain satisfaction on the judgment against him if he has no assets or his assets are not within reach.

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The extent of the admiralty jurisdiction of the Admiralty Court is set out in s. 20(1) of the 1981 Act. It states as follows:

> (1) The Admiralty jurisdiction of the High Court shall be as follows, that is to say:

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(a) jurisdiction to hear and determine any of the questions and claims mentioned in sub-s (2);

(b) jurisdiction in relation to any of the proceedings mentioned in subsection (3);

(c) any other Admiralty jurisdiction which it had immediately before the commencement of this Act; and

(d) any jurisdiction connected with ships or aircraft which is vested in the High Court apart from this section and is for the time being by rules of court made or coming into force after the commencement of this Act assigned to the Queen's Bench Division and directed by the rules to be exercised by the admiralty court.

Then under s. 20(2) of the 1981 Act a comprehensive list of "maritime claims" are spell out as follows:

(2) The questions and claims referred to in sub-s (1)(a) are:

(a) any claim to the possession or ownership of a ship or to the ownership of any share therein;

(b) any question arising between the co-owners of a ship as to possession, employment or earnings of that ship;

(c) any claim in respect of a mortgage of or charge on a ship or any share therein;

(d) any claim for damage received by a ship;

(e) any claim for damage done by a ship;

(f) any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment, or in consequence of the wrongful act, neglect or default of:

(i) the owners, charterers or persons in possession or control of a ship; or

(ii) the master or crew of a ship, or any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of a ship are responsible,

being an act, neglect or default in the navigation or management of the ship, in the loading, carriage or discharge of goods on, in or from the ship, or in the embarkation, carriage or disembarkation of persons on, in or from the ship;

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(g) any claim for loss of or damage to goods carried in a ship;

(h) any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship;

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(i) any claim in the nature of salvage (including any claim arising by virtue of the application, by or under (section 87 of the Civil Aviation Act 1982), of the law relating to salvage to aircraft and their apparel and cargo);

C

(j) any claim in the nature of towage in respect of a ship or an aircraft;

(k) any claim in the nature of pilotage in respect of a ship or an aircraft;

D

(l) any claim in respect of goods or materials supplied to a ship for her operation or maintenance;

(m) any claim in respect of the construction, repair or equipment of a ship or in respect of dock charges or dues;

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(n) any claim by a master or member of the crew of a ship for wages (including any sum allotted out of wages or adjudged by a superintendent to be due by way of wages);

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(o) any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship;

(p) any claim arising out of an act which is or is claimed to be a general average act;

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(q) any claim arising out of bottomry;

(r) any claim for the forfeiture or condemnation of a ship or of goods which are being or have been carried, or have been attempted to be carried, in a ship, or for the restoration of a ship or any such goods after seizure, or for droits of Admiralty.

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However for admiralty claims *in personam* in respect of collusion and similar cases a set of conditions laid down in s. 22 of the 1981 Act must be first satisfied before they could be entertained.

I

Is The Defendants' Counterclaim Within The Admiralty Jurisdiction?

Having set out the extent of the admiralty jurisdiction and maritime claims under the 1981 Act, we now examine the nature of the defendants' counterclaim. Principally, the cause of action therein is for wrongful arrest and detention of the two tugboats. Then subsequently, by way of amendments, claims for damages in respect of the failure of the plaintiffs to comply with the order issued by the senior assistant registrar in respect of insuring and maintenance of the two tugboats were added. But it is our view that none of these causes of action fall within any of the provisions set out in relevant sections of the 1981 Act or, for that matter, any other sections in the said Act. These claims of the defendants, we find, are certainly outside the ambit of the admiralty jurisdiction. In this respect, we find that the learned High Court Judge was correct in his conclusion pertaining to the issue of admiralty jurisdiction *viz.*, the defendants' counterclaim is not within the ambit of the Admiralty Court.

But this matter does not end here. The question that follows is: can the defendants maintain their counterclaim that is not within the admiralty jurisdiction in an action first commenced as an admiralty action, like in this case? For this, we examined O. 15 r. 2 of the Rules of High Court (RHC) which provides:

> The counterclaim must be one which the Court has jurisdiction to entertain as a separate action and must be for a claim for which the defendant could sue, as plaintiff, the persons against the counterclaim is set up.

In *Amon v. Bobbett* [1889] 22 QBD 543, Bowen LJ declares:

> A counterclaim is a separate and independent action which is to be tried together with the original action.

Expanding further, the learned author in *'Orders on High Court Pleading and Practice'* 23rd edn at p. 243 declares:

> It (counterclaim) need not relate to or be any way connected with the plaintiff's claim, or arise out of the same transaction. It need not be the same nature as the original action (per Fry J in *Beddall v. Maitland* [1881] 17 Ch. D @ 181) or even analogous thereto. If the defendant has any valid cause of action, legal or equitable, against the plaintiff, there is no necessity for him now to bring a cross-action, unless his counterclaim is of such a nature that it cannot conveniently be tried by the same tribunal or at the same time as the plaintiff's claim.

A This statement is accepted in our courts *Shanghai Hall Ltd v. Town House Hotel Ltd* [1967] 1 MLJ 223 at p. 228.

From the above established legal principles, we can safely say that unless the counterclaim is of a nature that cannot be conveniently
B tried by the same tribunal then such claim, though not related to or by any way connected with the plaintiffs' claim or even arise out of the same transaction or of the same nature as the plaintiffs' claim, can be maintained in the same action.

C But here we are faced with one additional factor namely, that of different jurisdictions: the plaintiffs' claim is within the admiralty jurisdiction whilst the defendants' counterclaim falls under the normal civil jurisdiction. Though there is a difference in jurisdiction, we are of the view that the same principle governing the
D entertainment of counterclaim in an action as disclosed above applies. In this instant case we cannot ignore the fact that even if the claim and counterclaim are to be tried separately it would still be tried by a High Court Judge at Miri. It would be more convenient for him to hear these actions together since the
E counterclaim, though of a different nature, arose out of one series of events. There can be no denial that substantial inconvenience and extra expenditure in time and cost would be incurred if these two sets of actions were to be tried separately. This view seems to find support in *The Cheapside* [1904] P 339 where the facts are
F these:

The plaintiffs are owners of tug boat *Oscar Dickson*. They filed an admiralty action for salvage against the defendant, the owner of a steamship *Cheapside* for refusing to pay salvage charges incurred when *Oscar Dickson* assisted *Cheapside* to re-float when the latter
G was grounded several times in the course of negotiating down river. The defence was one of denial of such salvage assistance and if rendered such charges was included in the bill tendered by the charterers. Aside from this defence, there was a counterclaim against the plaintiffs as owners of *Oscar Dickson* for damages
H suffered as a result of the detention of the defendants' vessel by the plaintiffs in breach of two chartered parties of previous dates, events unrelated to the current claim. Though agreeing that the defendants' counterclaim is not within the jurisdiction of the Court of Admiralty (whilst the plaintiffs' claim is) Collins MR has this to
I say:

> However, this point has been raised before, and it has been decided that the Judge of the Court of Admiralty does not cease to be a judge of the High Court because he is judge of the Court of Admiralty, and although as judge of the Court of Admiralty he may have no jurisdiction in such a case as this *in personam*, as Judge of the High Court he has, and whether or not he can blend those two jurisdictions is a matter for his discretion, subject to review by this Court.
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> In this case the judge of the Court of Admiralty has endeavoured to do justice by not dividing the two jurisdictions, but by availing himself of the fact that he has a double jurisdiction, which will enable him to do justice in this way ... he would be abundantly justified in exercising it in this case ... In my opinion the learned judge has properly exercised his discretion and was within his jurisdiction in so doing.

Applying this same rational, we are of the view that though the two actions (plaintiffs' claim and the defendants' counterclaim) belong to two different jurisdictions, the trial judge should have blended these two jurisdictions for the sake of convenience and disposed off the counterclaim as a non-admiralty proceeding in an action that is originated from an admiralty proceeding.

Conclusion

Having made these findings, we are of the opinion that since the defendants' counterclaim involves the finding of liability and quantum it would be appropriate for the court of first instance to decide on such matters. The appellate court should confine itself to hearing appeals from the court below rather than engaging itself on matters which the court of first instance is most suited to perform.

For reasons aforesaid, we hereby allow this appeal of the defendants' with costs and directs that the defendants' counterclaim be tried by the court of first instance.